

University of St. Thomas Law Journal

Volume 16
Issue 1 *Labor Law and Antitrust Law in the Age
of Trump*

Article 1

October 2019

Introduction: Labor Law and Antitrust Symposium

Charles J. Reid Jr.
cjreid@stthomas.edu

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Recommended Citation

Charles J. Reid Jr., *Introduction: Labor Law and Antitrust Symposium*, 16 U. ST. THOMAS L.J. 1 (2019).
Available at: <https://ir.stthomas.edu/ustlj/vol16/iss1/1>

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FOREWORD

INTRODUCTION: LABOR LAW AND ANTITRUST SYMPOSIUM

DR. CHARLES J. REID, JR.*

Labor law and antitrust law might seem to have little in common. But, that is not, in fact, the case. Indeed, they occupy almost singular positions in the American legal order as dissenting voices in a system that prizes, above all else, those capitalist principles of efficiency, the maximization of profits, and the formal freedom of contracts and markets.

The founding premises of both labor law and antitrust law pose a challenge to this view. Labor law recognizes that the interests of capital, management, and the owners of industries are not the only interests worthy of legal protection. Labor law shifts this focus. It insists that the employees who are the actual producers of goods and services have interests that are not identical with, and indeed may conflict with, the firms and businesses that are their employers. This much is intuitively obvious, of course. The maximization of shareholder wealth, after all, must entail the lowest feasible labor cost. Working persons, on the other hand, view matters differently. They have bills to pay and families to clothe and feed, and they seek a return on their labor commensurate to what they produce and what they require.

In its design, labor law gave official recognition to the reality of these divergent interests and attempted to strike a balance between the two sides. If corporate interests can pool capital and seek legal shelter, it stands to reason that labor should also have the right to organize collectively and bargain for a better deal.

The two-century history of American labor law can be reduced to variations on these themes. The early period, roughly between the mid-nineteenth century to the mid-1930s, was characterized by confrontation. Laborers enjoyed few rights and employers were quick to resort to overwhelming force, including the use of police and the military, to break up

* Charles J. Reid, Jr., is a professor of law at the University of St. Thomas (MN), where he teaches in the fields of Labor Law and Contracts.

strikes.¹ The mid-1930s to roughly the mid-1960s, on the other hand, featured recognition and acceptance. But over the last half-century or so, the pendulum has started to swing back, as we have witnessed concerted efforts to attack organized labor politically and to discredit its place and role in American society. Consider Arthur Goldberg (1908–1990), who served as a legal advisor to the AFL-CIO² and the United Steelworkers of America³ prior to his appointment to the United States Supreme Court in 1962. A similar *cursus honorum* today is probably unthinkable.

Antitrust law raises a different but complementary set of questions about the reigning paradigm. The origins of antitrust law date to a period of time in American history not unlike our own—the Gilded Age of the late nineteenth century. This was the age of the great monopolies and the great muckrakers who denounced their malfeasance. Ida Tarbell in her two-volume history exposed the power of the Standard Oil Company of John Rockefeller,⁴ while President Theodore Roosevelt denounced “malefactors of great wealth”⁵ and sought to “bust up” the trusts (i.e., the monopolies).⁶

At its heart, antitrust law asks difficult questions about market freedom. It acknowledges the distinction between formal freedom and real freedom and recognizes that real market freedom can be constrained by superior economic force. This is force that comes not from the threat of government action but from the dominance of a few well-situated, well-financed market players.

The origins of antitrust law are traceable to the left-leaning economic populism of the 1880s and 1890s. In that age of austerity economics, disinflationary monetary policy, and vast economic inequality, bigness itself was feared. Popular pressure brought about reform in the law, and the government responded by breaking up at least some of the gargantuan firms.

A much different climate of opinion prevailed, however, in the 1970s and early 1980s, as rising prices and skyrocketing interest rates threatened to create runaway inflation. It was in this context that Robert Bork proposed a reconceptualization of antitrust as a branch of consumer protection law that had, as its special concern, the minimization of consumer costs.⁷ This view challenged the older “interventionist, populist, Brandeisian, and

1. See, e.g., JOSIAH BARTLETT LAMBERT, *IF THE WORKERS TOOK A NOTION: THE RIGHT TO STRIKE AND AMERICAN POLITICAL DEVELOPMENT* 66–70 (2005).

2. Abner Mikva, *Arthur J. Goldberg, the Practitioner*, J. SUP. CT. HIST. 1, 3 (1990).

3. MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER* 55 (1994).

4. 1–2 IDA TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904); cf. STEVE WEINBERG, *TAKING ON THE TRUST: HOW IDA TARBELL BROUGHT DOWN JOHN D. ROCKEFELLER AND STANDARD OIL* (2008) (providing historical detail).

5. President Theodore Roosevelt, *Address on the Occasion of the Laying of the Cornerstone of the Pilgrim Memorial Monument* (Aug. 20, 1907).

6. Eugene V. Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 747–48 (1949).

7. See ROBERT BORK, *THE ANTITRUST PARADOX* (1st ed. 1978).

vaguely Jeffersonian conception of antitrust law.”⁸ It has also gained acceptance at the United States Supreme Court.⁹

Refreshingly, however, in today’s economic environment, which Thomas Piketty and others have shown closely resembles antitrust’s Gilded Age origins,¹⁰ a new generation of scholars have challenged the Borkian synthesis. Thus, Tim Wu, professor of law at Columbia University, has channeled Supreme Court Justice Louis Brandeis, who spoke of the “curse of bigness,”¹¹ with his own emulatively titled work, *The Curse of Bigness: Antitrust in the New Gilded Age*.¹²

Lina Khan, in a single, seminal law review article, “has reframed decades of monopoly law.”¹³ Using Jeffrey Bezos’s Amazon as a case study, Khan effectively refuted the premise of the increasingly shopworn Borkian model.¹⁴ She argues that the negative impact of market dominance cannot have, as its chief or primary concern, a focus on low consumer prices. In his forthcoming “Antitrust, the Gig Economy, and Labor Market Power,” Marshall Steinbaum of the University of Utah has explored that “gray area within which a more powerful firm can tell a less-powerful contractor or worker what to do without being liable under antitrust or labor law.”¹⁵

This law journal symposium aspires to contribute to the exciting changes now occurring in both labor and antitrust law. Alana Semuels, who provided the keynote address, has done graduate work at the London School of Economics and has covered labor and economic issues for the *Los Angeles Times* and *The Atlantic*. She is presently a senior economics correspondent for *Time Magazine*. In essays like “The Online Gig Economy’s Race to the Bottom,”¹⁶ “I Delivered Packages for Amazon and It Was a Nightmare,”¹⁷ “Organized Labor’s Growing Class Divide,”¹⁸ and

8. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 835 (2014).

9. Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

10. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard Univ. Press 2014) (2013); Paul Krugman, *Why We’re in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014).

11. Jeffrey Rosen, *The Curse of Bigness*, ATLANTIC (June 3, 2016), <https://www.theatlantic.com/politics/archive/2016/06/the-forgotten-wisdom-of-louis-d-brandeis/485477/>.

12. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

13. David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>.

14. Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017).

15. Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, LAW & CONTEMP. PROBS. 3 (forthcoming 2019) (preliminary draft available on SSRN).

16. Alana Semuels, *The Online Gig Economy’s Race to the Bottom*, ATLANTIC (Aug. 31, 2018), <https://www.theatlantic.com/technology/archive/2018/08/fiverr-online-gig-economy/569083/>.

17. Alana Semuels, *I Delivered Packages for Amazon and It Was a Nightmare*, ATLANTIC (June 25, 2018), <https://www.theatlantic.com/technology/archive/2018/06/amazon-flex-workers/563444/>.

dozens of other publications, Semuels has built a reputation as one of the most important and insightful voices on labor in America.

Using her keen journalistic eye for contemporary developments and a finely-honed sense of nuance, Semuels documents some important shifts occurring in America's labor landscape. On the one hand, organized labor has grown weaker over the last decade, whether measured by membership rolls or by success in winning concessions from employers. Politically, at least at the federal level, matters do not look much better. Although Donald Trump has given lip service to labor, his administration has proven hostile to the interests of workers, as evidenced most recently by the nomination of the corporate lawyer, Eugene Scalia, to the position of Secretary of Labor.¹⁹

On the other hand, Semuels detects promising signs at the micro-level of local politics. Grassroots organizing efforts have begun to pay dividends. Semuels looks in particular to successful political campaigns in locations like San Francisco, Seattle, and New York City to win rights for Uber drivers and other employees exploited by the gig economy. At least some states have also adopted more progressive legislative measures. Increasing the minimum wage appears to be especially popular with the electorate whenever the question is put to a vote. Much more, however, needs to be done.²⁰

But while workers in progressive cities and states enjoy more rights and greater economic stability, there is a gaping bifurcation that is opening up across the country. In states that lack vibrant economic development, especially in parts of the American South and the older, industrial Midwest, workers lack the leverage and the confidence to press assertively for their rights. Furthermore, state and local governments in these regions tend to be held by conservatives who place a large premium on the desire to reduce labor costs to a minimum. Semuels nevertheless remains hopeful. Reliance on non-traditional forms of organization, political activism, and yes, even the occasional job action, as we saw in the last eighteen months with West Virginia²¹ and Oklahoma school teachers,²² can shift the balance of power.

Andrew Strom, a graduate of Harvard Law School and a labor lawyer since 1993, serves as the Associate General Counsel of the New York City local chapter of the Service Employees International Union (SEIU). He has been published in the *National Lawyers Guild Review*²³ and the *Berkeley*

18. Alana Semuels, *Organized Labor's Growing Class Divide*, ATLANTIC (Jan. 26, 2018), <https://www.theatlantic.com/business/archive/2018/01/union-organizing-media-white-collar/551453/>.

19. Meagan Day, *Eugene Scalia Is a Foe of the Working Class*, JACOBIN, July 24, 2019.

20. Eric Blanc & Puya Gerami, *The Left Needs a Statewide Strategy*, JACOBIN, July 28, 2019.

21. Eric Blanc, *The Lessons of West Virginia*, JACOBIN, Mar. 9, 2018; Nicole McCormick, *In West Virginia Education Wars, "We Can't Play Nice"*, JACOBIN, June 4, 2019.

22. Eric Blanc, *It's Oklahoma's Turn to Strike*, JACOBIN, Mar. 30, 2018.

23. Andrew Strom, *Boeing and the NLRB: A Sixty-Four Year Time Bomb Explodes*, 68 NAT'L LAW. GUILD REV. 109 (2011).

Journal of Employment and Labor Law.²⁴ He is also a senior contributor to the blog *On Labor*, where he produces important essays and insights on a near-continuous basis.²⁵ I must also acknowledge a personal debt of gratitude. Because of their invariable lucidity, thoroughness, and relevance to the subject, when I was first asked to teach labor law, I relied shamelessly and relentlessly on Strom's contributions to the *On Labor* blog. His work is that good.

Strom has brought those same gifts of lucidity, thoroughness, and relevance to his contribution to the symposium. He points out that, from 1948 to 1973, when union membership was at its strongest, both productivity and wages tended to increase together. As worker productivity improved, so did incomes and standards of living. That nexus, however, was broken in the mid-1970s and has not been repaired since. Union membership has moved in a steady downward arc. At the same time, workplace productivity continued its upward trajectory. Thus, we have seen immense productivity gains in the years since 1973. Very little of that increase in productivity, however, has been passed through to the workers in the form of wages or benefits.

Four decades of stagnant and declining wages gave rise to predictable political instability. And while Donald Trump lost the popular vote in 2016 by nearly three million votes, he was able to convince strategically-located sectors of the electorate—particularly in old labor strongholds in Wisconsin, Michigan, and Pennsylvania—to take a chance on him. He professed, after all, to be a different type of Republican, one who had an interest in the plight of the working class.

Strom gives what amounts to a master class in close legislative and judicial analysis as he examines the difference between Trump's political rhetoric and political reality. When compared to the realities of Republican labor policy, Trump's claims to be different can only be described as hollow, if not actively deceptive. A series of legislative measures have been introduced in the House of Representatives that aim to dismantle large portions of the National Labor Relations Act. Trump's judges—including his appointments to the United States Supreme Court—have consistently ruled against labor interests.²⁶ Trump's National Labor Relations Board, meanwhile, has dismantled procedural protections that have been in place for decades and have been supported equally by Board members of both major political parties. For proof, one must, of course, read Strom's contribution,

24. Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 BERKELEY J. EMP. & LAB. L. 50 (1994).

25. See Andrew Strom, *Once Again, the Trump NLRB Has Placed Employer Rights Ahead of Workers' Rights*, ON LAB., July 11, 2019; Andrew Strom, *Trump Judges vs. Trump Voters*, ON LAB., Feb. 6, 2019; Andrew Strom, *Justice Powell Wouldn't Recognize the Monster He Created*, ON LAB., Dec. 13, 2018.

26. See, e.g., Kavitha Iyengar, *Janus v. AFSCME*, 40 BERKELEY J. EMP. & LAB. L. 183 (2019).

which is simultaneously meticulous and searing in its very matter-of-factness.

Sanjutka Paul, finally, is an assistant professor of law at Wayne State University and is doing important work at the nexus of labor law and antitrust law. She has a book project in process entitled *Solidarity in the Shadow of Antitrust: Labor and the Legal Idea of Competition*. In 2016, she won a Jerry S. Cohen Memorial Fund category prize for her law review article, “The Enduring Ambiguities of Antitrust for Worker Collective Action.”²⁷

In her contribution to the law journal symposium (co-authored with Nathan Tankus of Cornell University), Professor Paul examines the gig economy, the way we conceive of the relationship between employment and entrepreneurship, and the unspoken preference that the law has for concentrated capital and wealth.

The heart of her paper consists of a close and careful analysis of a problem that might be put in the form of an extended hypothetical scenario. Suppose drivers of a ride-share company, like Uber or Lyft, are classified, at least under prevailing legal standards, as contractors, not employees. But even if they are contractors, they nevertheless experience all of the problems of the typical employee. They lack individual bargaining power, and a more powerful “employer” can exploit their weak market position to drive a hard bargain.

Now suppose that these drivers wish to organize, in order to negotiate a better deal with the ride-share company. Because they have been classified as contractors, they cannot take advantage of the labor laws to organize a union. And because they are independent contractors, any attempt to organize an association of like-minded drivers to improve bargaining power or set minimum standards on pay, hours, or benefits runs the risk of violating the price-fixing or collusion provisions of the antitrust laws. So we find ourselves in the paradoxical situation of individual contractors who lack meaningful bargaining power being precluded from improving their position by the operation of a law intended to reduce the dominance of large firms like John D. Rockefeller’s Standard Oil.

Although Professor Paul’s paper makes for bleak reading, it is a necessary contribution to the debate. By laying bare the ways in which laws that were devised to help small market participants like Uber drivers now in fact harm their interests, she sheds light on the path to much-needed reform.

27. Sanjukta Paul, *The Enduring Ambiguities of Antitrust for Worker Collective Action*, 47 *LOY. U. CHI. L.J.* 969 (2016).